Supreme Court, U.S.
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Record No. _____

In The Supreme Court of the United States

JERRY W. and MARCIA H. MARKHAM,
Petitioners,

v.

ALAN B. COMSTOCK,
as Assessor of Town of Jerusalem,
BOARD OF ASSESSMENT OF TOWN OF JERUSALEM,
and ATTORNEY GENERAL OF STATE OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department

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PETITION FOR A WRIT OF CERTIORARI

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November 17, 2000

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QUESTION PRESENTED

Whether the Constitution of the United States precludes the State of New York from denying a partial school tax exemption to nonresident property owners where:

(a) residents of the taxing district are given the exemption for the same class of property; and

(b) nonresidents are not allowed to use the schools for which the tax is levied.

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IN THE SUPREME COURT OF THE UNITED STATES

JERRY W. AND MARCIA H. MARKHAM, *Petitioners*,

v.

ALAN B. COMSTOCK, AS ASSESSOR OF TOWN OF JERUSALEM, BOARD OF ASSESSMENT OF TOWN OF JERUSALEM, AND ATTORNEY GENERAL OF STATE OF NEW YORK, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

Jerry W. and Marcia H. Markham, *pro se*, respectfully petition for a Writ of Certiorari to review the judgment of the Appellate Division, Fourth Judicial Department of the Supreme Court of the State of New York in this case.

OPINIONS BELOW

The opinion of the Appellate Division (App. A, *infra*, A5) is reported at 272 A.D.2d 971, 708 N.Y.S.2d 674 (May 10, 2000). The order of the Supreme Court of Yates County, New York that was modified by the Appellate Division (App. A, *infra*, A1) is unreported. The opinion of the Court of Appeals of the State of New York (App. A, *infra*, A9)

denying review of the Appellate Division's decision (September 19, 2000) is unreported at the time of the filing of this petition.

JURISDICTION

The decision of the Appellate Division, Fourth Department of the Supreme Court of New York was entered on May 10, 2000. The New York Court of Appeals denied review of that decision on September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Statute

The New York School Tax Relief program ("STAR") was created by New York Real Property Tax Law § 425 (a copy of the pertinent parts of that statute is set forth in App. B, *infra*, B1). In order to qualify for partial exemption for school taxes authorized by the STAR program, "the property must be a one, two or three family residence, a farm dwelling or residential property held in condominium or cooperative form of ownership." N. Y. REAL PROP. TAX LAW § 425 (3)(a) (McKinney 2000) (App. B, *infra*, B2). Owners of such property are denied the exemption, if it is not maintained as their primary place of residence. *See id.* § 425 (3)(b) (App. B, *infra*, B2).

Constitution

Section One of the Fourteenth Amendment to the U.S. Constitution states in pertinent part that:

> No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article One, section eight of the U.S. Constitution states in pertinent part that:

> The Congress shall have power . . . To regulate commerce . . . among the several States . . . .

STATEMENT

Petitioners, Jerry W. and Marcia H. Markham (hereinafter sometimes referred to as the "Markhams") are husband and wife and are residents of Chapel Hill, North Carolina. The Markhams also own a residence on one of the finger lakes (Keuka Lake) in upstate New York. That property, which is located at 1087 East Bluff Drive in the Town of Jerusalem in Yates County, New York, is used by the Petitioners as a summer home. The Respondents are the Town of Jerusalem, Alan B. Comstock, the Town's assessor, the Town's Board of Assessment Review (hereinafter sometimes collectively referred to as the "Town") and the Attorney General of New York, who intervened as a party in the proceedings below.

The Petitioners instituted tax certiorari proceedings under Article 7 of the New York Real Property Tax Law in the Supreme Court of Yates County to challenge a property tax assessment made by the Town on the property located at 1087 East Bluff Drive for the tax year 1999. Count III of the tax certiorari proceeding charged that the Town improperly denied the Markhams a partial exemption for school property

encourage residency; it would also encourage local commerce and relieve poverty. Why not allow only residents of New York City to sell brokerage services? That would certainly encourage residency. Why not impose a prohibitive tax on nonresidents of Rochester who seek to sell or make photographic film? This too would encourage local residency and discourage nonresidents. The answer is of course that such discrimination is prohibited by the constitution, no matter how thinly or thickly disguised.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Jerry W. Markham
Counsel of Record for
Petitioners *pro se*
124 Red Bud Lane
Chapel Hill, N.C. 27514
(919) 942-1474

November 17, 2000

APPENDIX A

PRESENT: Honorable W. Patrick Falvey
Acting Supreme Court Justice

SUPREME COURT
STATE OF NEW YORK COUNTY OF YATES

In the Matter of the petition of

JERRY W. MARKHAM and MARCIA MARKHAM,

Petitioners,

vs.

ORDER

ALAN B. COMSTOCK, as the TOWN OF JERUSALEM ASSESSOR, and THE BOARD OF ASSESSMENT REVIEW OF THE TOWN OF JERUSALEM,

Index No.: 99-132

Respondents.

Respondents Alan B. Comstock, the Town of Jerusalem Assessor, and the Board of Assessment Review of the Town of Jerusalem, having moved this Court for Summary Judgment pursuant to CPLR Rule 3212, and petitioners, Jerry W. Markham and Marcia Markham, having responded, and said motion having come on or before this Court to be heard at a Special Term thereof on August 3, 1999;

AND, upon reading Respondents' Notice of Motion dated July 22, 1999, the Affidavit of Paul F. Kenneally, sworn to July 22, 1999, with attached exhibits, the Affidavit of Jay Loson, sworn to July 29, 1999, and the Reply

Affidavit of Paul F. Keneally, sworn to July 30, 1999, with attached exhibits, in support of the Respondents' Motion, and the Affidavit of Jerry W. Markham, sworn to July 28, 1999, with attached exhibits, the Affidavit of Bill Quinn, sworn to July 28, 1999, with attached exhibits, and the Further Affidavit of Jerry W. Markham, sworn to August 3, 1999, in opposition to Respondents' Motion;

AND after hearing Underberg & Kessler LLP (Paul F. Keneally, Esq., of counsel), attorneys for Respondents, in support of Respondents' Motion, and Jerry W. Markham, on behalf of Petitioners *pro se*, in opposition to Respondents' Motion;

AND after due deliberation having been had and an oral decision having been rendered on August 3, 1999,

NOW, THEREFORE, it is hereby

ORDERED, that Respondents' motion for summary judgment pursuant to Rule 3212 is denied as to Count 1 of the Petition and granted as to Counts 2 and 3 of the Petition, and

IT IS FURTHER ORDERED, that pursuant to CPLR §2220, the filing of the papers upon which this order is made be, and hereby is, waived.

DATED: August 16, 1999
Penn Yan, New York

/s
Honorable W. Patrick Falvey
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

777

PRESENT: GREEN, J. P., WISNER, HURLBUTT, KEHOE, AND LAWTON, JJ.

CA 99-1171

MATTER OF JERRY W. MARKAM AND MARCIA H. MARKHAM, PETITIONERS-APPELLANTS-RESPONDENTS,

V

ALAN B. COMSTOCK, AS ASSESSOR OF TOWN OF JERUSALEM, BOARD OF ASSESSMENT REVIEW OF TOWN OF JERUSALEM, RESPONDENTS-RESPONDENTS-APPELLANTS,
AND ATTORNEY-GENERAL OF STATE OF NEW YORK, INTERVENOR-RESPONDENT.

Jerry W. Markham and Marcia H. Markham having appealed to this Court from certain parts of the order of the Supreme Court, entered in the Yates County Clerk's Office on August 19, 1999, and Alan B. Comstock, as Assessor of Town of Jerusalem, and Board of Assessment Review of Town of Jerusalem having appealed from certain parts of said order, and said appeals having been submitted by Jerry W. Markham and Marcia H. Markham, petitioners-appellants-respondents, argued by Paul F. Keneally of counsel for respondents-respondents-appellants, Andrew D. Bing of counsel for intervenor-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously modified on the law by denying that part of respondents' motion seeking

summary judgment dismissing the third cause of action and granting judgment in favor of respondents on that cause of action as follows:

> It is ADJUDGED AND DECLARED that RPTL 425 (3) (b), insofar as challenged by petitioners, is constitutional

and as modified the order is affirmed without costs.

Memorandum that is hereby made a part hereof.

Entered: May 10, 2000 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(777) CA 99-1171. (Yates Co.) – MATTER OF JERRY W. MARKHAM AND MARCIA H. MARKHAM, PETITIONERS-APPELLANTS-RESPONDENTS, V ALAN B. COMSTOCK, AS ASSESSOR OF TOWN OF JERUSALEM, BOARD OF ASSESSMENT REVIEW OF TOWN OF JERUSALEM, RESPONDENTS-RESPONDENTS-APPELLANTS, AND ATTORNEY-GENERAL OF STATE OF NEW YORK, INTERVENOR-RESPONDENT.

-- Order unanimously modified on the law and as modified affirmed without costs and judgment granted in accordance with the following Memorandum: Petitioners, residents of North Carolina, commenced this proceeding pursuant to RPTL article 7 to challenge the increase in the assessed value of their summer residence on Keuka Lake for the 1999-2000 tax year. The first cause of action alleges that the assessment is excessive; the second cause of action alleges that respondents acted in bad faith in increasing the assessed value of their property; and the third cause of action alleges that the school tax reiief (STAR) exemption authorized by RPTL 425 is unconstitutional.

Supreme Court properly denied that part of respondents' motion seeking summary judgment dismissing the first cause of action. Respondents failed to demonstrate their entitlement to judgment as a matter of law with respect to that cause of action (*see, Matter of Bradley v Board of Assessment Review*, 198 AD2d 766, 767). Even assuming, arguendo, that respondents met their initial burden on the motion, we conclude that petitioners raised a triable issue of fact whether and to what extent the improvements to their

property increased its market value (*see, Matter of Pezzo v Mazzetti*, 202 AS2d 935).

The court properly granted that part of respondents; motion seeking summary judgment dismissing the second cause of action. Whether respondents acted in bad faith in increasing the assessed value of petitioners' property has no bearing on the correctness of the assessment (*see, Blooming Grove Props. v Board of Assessors*, 34 AD2d 953; *Matter of Katz Buffalo Realty v Anderson*, 25 AD2d 809, 809-810).

The court erred, however, in granting that part of respondents' motion seeking summary judgment dismissing the third cause of action on the grounds that the court lacked jurisdiction over that cause of action and petitioners failed to join New York State as a party. Contrary to the court's determination, the Court of Claims is not the appropriate forum for litigating a constitutional challenge to the STAR exemption (*see, Cass v State of New York*, 58 NY2d 460, 463, *rearg denied* 60 NY2d 586). Rather, "a declaratory judgment action in the Supreme Court is an appropriate vehicle for challenging the constitutionality of a statute" (*Cass v State of New York, supra*, at 463). Further, it was the responsibility of the court rather than petitioners to provide notice to the Attorney-General that the constitutionality of RPTL 425 was at issue (*see,* CPLR 1012 [b]; Executive Law § 71; *520 E. 81st Assocs. v Lenox Hill Hosp.*, 157 AS2d 138, 145, *revd on other grounds* 77 NY2d 944). Despite the court's failure to provide such notice to the Attorney-General, we may address the constitutional issue because the Attorney-General has exercised his right to intervene and submitted a brief responding to petitioners' constitutional challenges to RPTL 425 (*see, 520 E. 81st Assocs. v Lenox Hill Hosp., supra,* at 145; *Commissioner of Labor of State of N.Y. v Chudzick*, 124 AS2d 1035, 1036).

We reject petitioners' contention that the limitation of the STAR exemption to property that "serve[s] as the primary residence of one or more of the owners thereof" (RPTL 425 [3] [b]) violates the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, § 2). That limitation does not favor New York residents over nonresidents (*cf., City of New York v State of New York*, __ NY2d __ [decided Apr. 4, 2000]). Rather, it distinguishes between property that serves as an owners' primary residence and property that does not and is unavailable with respect to property that is not the owner's primary residence whether the owner is a New York resident or not. Because New York residents and nonresidents are treated alike, the Privileges and Immunities Clause is not implicated (*see, Citizens for Uniform Taxation v Northport Pub. School Dist.*, __ NW2d __ [decided Jan. 7, 2000] [Mich. App.]; *Rubin v Glaser*, 83 NJ 299, 306-307, 416 A2d 382, 386-387, *appeal dismissed* 449 US 977; *cf., City of New York v State of New York, supra*).

We also reject petitioners' contention that the limitation of the STAR exemption to primary residences violates the Equal Protection Clause of the United States Constitution (US Const, 14th Amend, § 1). That limitation is rationally related to the State's legitimate interest in protecting and promoting residences, and furthers that interest by relieving the real estate tax burden on such ownership (*see, Citizens for Uniform Taxation v Northport Pub. School Dist., supra*; *Rubin v Glaser, supra*, 83 NJ, at 308-309, 416 A2d, at 387-388; *see generally, Port Jefferson Health Care Facility v Wing*, 94 NY2d 284). We therefore modify the order by denying that part of respondents' motion seeking summary judgment dismissing the third cause of action and granting judgment in favor of respondents on that cause of action declaring that RPTL 425 (3) (b), insofar as

APPENDIX B

N.Y. REAL PROP. TAX LAW § 425. School tax relief (STAR) exemption, in relevant part:

1. Generally. Real property which satisfies the requirements of this section shall be exempt from taxation for school purposes as provided herein.

2. Exempt amount. (a) Overview. The exempt amount for each assessing unit shall be determined annually as set forth in this subdivision, by multiplying the "base figure" by the locally-applicable "sales price differential factor," if any, multiplying the product by the appropriate "equalization factor" for the assessing unit, and, if necessary, increasing the result to equal the applicable "floor." The result is then rounded to the nearest multiple of ten dollars.

(b) Base figure. Subject to the adjustments prescribed below, the base figure for the exemption shall be as follows:

(i) For the nineteen hundred ninety-eight—ninety-nine school year, the base figure shall be fifty thousand dollars for eligible senior citizens; no exemption shall be allowed for other persons.

(ii) For the nineteen hundred ninety-nine—two thousand school year, the base figure shall be fifty thousand dollars for eligible senior citizens, and ten thousand dollars for eligible persons.

(iii) For the two thousand one—two thousand two school year and thereafter, the base figure shall be fifty thousand dollars for eligible senior citizens, and twenty thousand dollars for eligible persons.

(iv) For the two thousand one—two thousand two school year and thereafter, the base figure shall be fifty thousand dollars for eligible senior citizens, and thirty thousand dollars for other eligible persons.

* * *

3. Eligibility requirements. (a) Property use. To qualify for exemption pursuant to this section, the property must be a one, two or three family residence, a farm dwelling or residential property held in condominium or cooperative form of ownership. The exemption may be granted to property that is used for such purposes even if it is partially used for other purposes as well, provided that the eligibility requirements are otherwise satisfied.

(b) Primary residence. The property must serve as the primary residence of one or more of the owners thereof.

* * *

10. Proof of residency. (a) Requests. From time to time, the assessor may request proof of residency from the owner or owners of any property which is exempt pursuant to this section. In addition, the assessor shall request proof of residency from any such owner or owners when requested to do so by the state board.

(b) Timing. A request for proof of residency shall be mailed at least sixty days prior to the ensuing taxable status date. The owner or owners shall submit proof of their residency to the assessor on or before the ensuing taxable status date.

(c) Review of submission. The burden shall be on the owner or owners to establish that the property is their primary residence. If they submit proof of residency on or before the ensuing taxable status date, and the submission demonstrates to the assessor's satisfaction that the property is the primary residence of one or more of the owners thereof, and if the requirements of this section are otherwise satisfied, the exemption shall continue in effect on the ensuing tentative assessment roll. Otherwise, the assessor shall discontinue the

exemption on the next ensuing tentative assessment roll as provided herein, and, where appropriate, shall proceed as further provided herein.

* * *

APPENDIX B

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(ii) For the nineteen hundred ninety-nine—two thousand school year, the base figure shall be fifty thousand dollars for eligible senior citizens, and ten thousand dollars for eligible persons.
(iii) For the two thousand one—two thousand two school year and thereafter, the base figure shall be fifty thousand dollars for eligible senior citizens, and twenty thousand dollars for eligible persons.
(iv) For the two thousand one—two thousand two school year and thereafter, the base figure shall be fifty thousand dollars for eligible senior citizens, and thirty thousand dollars for other eligible persons.

* * *

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* * *